92-1678

Supreme Court, U.S.
FILED
APR 19 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1992

STATE OF ALABAMA,

PETITIONER,

V.

TRACY MONIQUE CALDWELL,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX TO THE PETITION OF THE STATE OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

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TABLE OF APPENDICIES

	PAGE(S)
APPENDIX A, ORDER OF THE CIRCUIT COURT OF TUSCALOOSA COUNTY, ALABAMA.....	1
APPENDIX B, OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA.....	3
ORDER DENYING REHEARING.....	13
APPENDIX C, ORDER OF THE SUPREME COURT OF ALABAMA DENYING THE WRIT OF CERTIORARI.....	15
APPENDIX D, RELEVANT ALABAMA STATUTES.....	17
TITLE 13A, SECTION 13A-6-2.....	17
SECTION 13A-6-43.....	19
SECTION 13A-7-5.....	20
SECTION 13A-8-41.....	21
APPENDIX E, Rule 15.7, ALABAMA RULES OF CRIMINAL PROCEDURE.....	22
APPENDIX F, DETAILED STATEMENT OF THE FACTS.....	26

APPENDIX A

ORDER OF THE CIRCUIT COURT

OF TUSCALOOSA COUNTY, ALABAMA

[RECORD, PAGE 132]

IN THE CIRCUIT COURT FOR

TUSCALOOSA COUNTY, ALABAMA

CASE NO. CC89-1305

STATE OF ALABAMA

VS

TRACY M. CALDWELL

DEFENDANT

ORDER

This cause was heard on defendant's motion to suppress the statement given by the defendant on the grounds that the defendant did not fully and voluntarily waive her rights, because she did not understand her rights and the "miranda warnings."

After a review of all the evidence, it is the opinion of this court that the defendant did not understand her miranda rights and did not freely and voluntarily waive said rights.

Therefore, [on] the motion to suppress[,] the statements taken to date are ordered suppressed.

ORDERED this 14th day of January, 1992.

/s/Thomas S. Wilson
CIRCUIT JUDGE

FILED

Record No. P____

FEB 6 1992

Doris T Turner, Clerk

APPENDIX B

OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA

Released

September 30 1992

Clerk

ALA COURT CRIMINAL APPEALS

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1991-92

CR-91-590

State of Alabama

v.

Tracy Monique Caldwell

Appeal from Tuscaloosa Circuit Court

(CC-89-1305)

MONTIEL, JUDGE

In July, 1989, the defendant, Tracy Monique Caldwell, was indicted for murder, in violation of §13A-6-2, Code of Alabama 1975; burglary in

the first degree, in violation of §13A-7-5; robbery in the first degree, in violation of §13A-8-41; and kidnapping in the first degree, in violation of §13A-6-43. After the Alabama Department of Mental Health found Caldwell competent to stand trial, she pleaded not guilty on June 21, 1990. On February 28, 1991, she moved to suppress certain statements she had made on November 10 and November 15, 1989. The trial judge held a hearing on the motion to suppress and during that hearing the judge heard expert testimony offered by the defendant and by the State. Their testimony differed sharply. Caldwell's expert testified that her I.Q. assessment administered in high school resulted in a score of 55. The most recent score, taken in 1991, was 71. Moreover, he expert described her as "educable mentally retarded." Further evidence at the hearing showed that she was given a "Grisso test," which is designed to determine a person's ability to comprehend a Miranda warning. Her expert actually interviewed her and concluded, based in part on the "Grisso test",

that the defendant could not comprehend a Miranda warning.

The State's expert witness, who did not interview Caldwell, criticized the "Grisso test" administered to her. The State's witness was also critical of the methodology used by Caldwell's expert. The State's expert reviewed the videotaped statements given by Caldwell and determined that she was competent to understand a Miranda warning and to waive her rights.

The State also offered the testimony of the law enforcement officials who interviewed Caldwell. These officials testified that her waiver was given voluntarily and without coercion from the police.

The evidence seemed to indicate that he police officers treated Caldwell as they would treat any other defendant. The officers indicated that they took care to explain "several words" to her. For example, the word "coerce" was specifically explained to her during the administration of the Miranda warnings. However, testimony for Caldwell indicated that "several

words" were not explained to her. Rather, her evidence indicated that only the word "coerce" was explained.

On January 14, 1992, after hearing all of the evidence, the trial judge granted the defendant's motion to suppress on the grounds that she could not have understood a Miranda warning. The State appeals this ruling.

The facts are undisputed that on November 19, 1989, Tuscaloosa, Alabama, law enforcement officials were investigating the disappearance of Ms. Corinne Harless from her Tuscaloosa home. Ms. Harless's automobile a 1985 model Mercury Cougar, was also missing from the residence. Police located Ms. Harless's vehicle at a Jack's restaurant in Tuscaloosa, and, when the police located it, Caldwell, and a man were in possession of it. Caldwell was arrested. Corporal M. A. Flowers of the Tuscaloosa Police Department proceeded to the scene of the arrest, and upon arrival, advised Caldwell of her rights; she orally waived them. Corporal Flowers placed Caldwell in his patrol car and proceeded to

police headquarters. While they were in the patrol car, Corporal Flowers asked Caldwell some questions, and she volunteered information about where she and her boyfriend had stayed the previous night. She stated that she did not know the whereabouts of Ms. Harless.

Later, on the same day, Investigator John Steele read Caldwell her Miranda warnings and her waiver. The defendant indicated that she understood her rights and the waiver, and she signed the waiver. She gave a statement regarding the location of Ms. Harless's body. Eventually, the body was found in a location other than the one Caldwell had described. Following the search, Caldwell was taken back to police headquarters and questioned again. Another investigator, Alan Fondren, advised her of her rights and after she had waived the rights, she gave a videotaped statement. After she gave this statement, she was released.

On November 15, 1989, Caldwell was arrested pursuant to an arrest warrant. Again, she was advised of her rights and again she waived them.

She then gave a second videotaped statement to police.

On appeal, the State argues that the voluntariness of a statement for the purposes of the Fifth Amendment, does not depend on whether the defendant comprehends the statement of Miranda. The State contends further, that equating an understanding of Miranda warnings with voluntariness cannot be defended. This argument has no merit. In its order of January 14, 1992, the trial court plainly stated, "After a review of all the evidence, it is the opinion of this court that the defendant did not understand her Miranda rights and did not freely and voluntarily waive said rights." (R. 132.) While the trial court never stated that the voluntariness of a statement is dependent on comprehending the Miranda rights, this court has held previously: "Whether a confession or inculpatory statement was knowingly and voluntarily made is a question of law and a proper determination for the trial judge." Agee v. State, 465 So.2d 1196, 1200 (Ala.Crim.App.

1984). It is important that a waiver of Miranda rights be knowing and voluntary. Certainly, whether a defendant can comprehend her rights is an important factor to be considered in determining whether her waiver of these rights is voluntary.

The State contends that compliance with Miranda procedure renders a custodial statement admissible. Specifically, the State contends that the law enforcement officials involved in this case properly followed Miranda procedure and, thus, that the defendant's subsequent statements to police should be admissible. The State further argues that a policy that permits the courts to "go behind an arrestee's assertion of understanding of the Miranda warning and 'make sweeping inquiries into the state of mind of ...' the arrestee at the time of that assertion, to see if he or she really ... understood the warning" is improper. However, we determine that the law of this State dictates that trial courts have the very authority to do that which the State argues against. We find that mere

compliance with Miranda procedure does not necessarily render a custodial statement admissible.

The record indicates that the police gave thorough warnings and explained the waiver of Miranda rights to the defendant. In each situation and prior to each statement, the defendant waived her rights. The test to determine the admissibility of a confession is a two-part inquiry: (1) the court considers whether the Government or the State has complied with the Miranda procedure and (2) upon finding a compliance with Miranda procedure, the court then rules on whether the confession was voluntary. United States v. Sims, 719 F.2d 375, 378 (1983), cert. denied, 465 U.S. 1034 (1984).

> "Additionally, all confessions are presumed to be involuntary. It is the duty of the trial court to determine if the confession was voluntarily given based on all of the facts surrounding the giving of the confession. When there is a conflict in the evidence surrounding the taking of the confession, and there is sufficient evidence to support the trial court's finding, this court will not disturb the finding of the trial court on appeal, unless it appears contrary to

> the great weight of the evidence, or is manifestly wrong, or unjust. The trial judge need only be convinced from a preponderance of the evidence that the confession was knowingly and voluntarily made."

Koger v. State, 443 So.2d 1343, 13 45-1346 (Ala. Crim.App. 1983). See also Holloway v. State, 561 So.2d 1119, 1121-1123 (Ala.Crim.App. 1990); Stallworth v. State, 445 So.2d 998, 999 (Ala. Crim.App. 1984).

In this case, it is clear that proper Miranda warnings were given. Nevertheless, the trial court had the responsibility to determine the voluntariness of the confession. This case presents conflicting evidence as to whether the defendant was competent to understand his Miranda rights, and thus could voluntarily waive them. The testimony of the expert witnesses differed sharply. Based on the Grisso test, the defendant's expert, who actually interviewed her, concluded that she could not comprehend a Miranda warning.

The State's expert, who did not interview the defendant, determined that she was competent

to understand a Miranda warning and waive her rights.

The trial judge was able to observe the defendant's demeanor, and, as finder of fact, was in the best position to resolve the conflict in the evidence. Based upon the evidence presented at the suppression hearing, we find that the trial court's determination that the defendant was unable to comprehend his Miranda rights and thus incompetent to voluntarily waive these rights, is not "manifestly contrary to the great weight of the evidence." Ex parte Matthews, [Ms. 1901837, Feb. 7, 1992] ___ So.2d ___ (Ala. 1992). Therefore, we cannot reverse the trial court's order suppressing the statements.

The order of the trial court is affirmed.

AFFIRMED.

All the Judges concur.

ORDER DENYING REHEARING

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JUDICIAL BUILDING, 445 DEXTER AVENUE

MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
WILLIAM M. BOWDEN, JR.
SAM TAYLOR
H. WARD McMILLIAN
MARK G. MONTIEL
Judges

Clerk's Office
(205) 242-4590

COURT OF CRIMINAL APPEALS NO. 91-590
(Tuscaloosa Circuit Court No. 89-1305)

STATE OF ALABAMA vs. Tracy Monique Caldwell
Appellant Appellee

Dear Sir or Madam:

You are hereby notified that on November 13, 1992, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied.

/s/LANE MANN
CLERK
COURT OF CRIMINAL APPEALS

Hon. Joseph G. L. Marston, III
Assistant Attorney General

Hon. James Smith
2820 7th Street
P.O. Box 283
Tuscaloosa,AL 35402

APPENDIX C

ORDER OF THE SUPREME COURT OF ALABAMA

DENYING THE WRIT OF CERTIORARI

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

February 5, 1993

1920253

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Tracy Monique Caldwell v. State)

(CCA 91-590 (Tuscaloosa CC 89-1305))

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

MADDOX, J. - Almon, Shores, Adams and Ingram, JJ., concur;

Houston and Steagall, JJ., dissent.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of th instrument(s) herewith set out as same appears o record in said Court.
Witness my hand this 5 day of Feb. 1993.
/s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

RELEVANT ALABAMA STATUTES

§13A-6-2. MURDER.

(a) A person commits the crime of murder if:

(1) With intent to cause the death of another person, he causes the death of that person or of another person; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or in immediate flight

therefrom, he, or another participant, if there be any, causes the death of any person.

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by article 2 of chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by article 2 of chapter 5 of this title or any amendments thereto.

§13A-6-43. KIDNAPPING IN THE FIRST DEGREE.

(a) A person commits the crime of kidnapping in the first degree if he abducts another person with intent to

(1) Hold him for ransom or reward; or

(2) Use him as a shield or hostage; or

(3) Accomplish or aid the commission of any felony or flight therefrom; or

(4) Inflict physical injury upon him, or to violate or abuse him sexually; or

(5) Terrorize him or a third person; or

(6) Interfere with the performance of any governmental or political function.

(b) A person does not commit the crime of kidnapping in the first degree if he voluntarily releases the victim alive, and not suffering from serious physical injury, in a safe place prior to apprehension. The burden of injecting the issue of voluntary safe release is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for or preclude a conviction of kidnapping in the second degree or any other crime.

(c) Kidnapping in the first degree is a Class A felony.

§13A-7-5. BURGLARY IN THE FIRST DEGREE.

(a) A person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, he or another participant in the crime:

(1) Is armed with explosives or a deadly weapon; or

(2) Causes physical injury to any person who is not a participant in the crime; or

(3) Uses or threatens the immediate use of a dangerous instrument.

(b) Burglary in the first degree is a Class A felony.

§13A-8-41. ROBBERY IN THE FIRST DEGREE.

(a) A person commits the crime of robbery in the first degree if he violates section 13A-8-43 and he:

(1) Is armed with a deadly weapon or dangerous instrument; or

(2) Causes serious physical injury to another.

(b) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence under subsection (a) of this section that he was so armed.

(c) Robbery in the first degree is a Class A felony.

APPENDIX E

ALABAMA RULES OF CRIMINAL PROCEDURE

RULE 15.7 PRE-TRIAL APPEALS BY THE STATE

(a) GENERALLY. An appeal may be taken by the state in a felony case to the Court of Criminal Appeals from a pre-trial order of the circuit court (1) suppressing a confession or admission or other evidence, (2) dismissing an indictment, information, or complaint (or any part of an indictment, information, or complaint), or (3) quashing an arrest or search warrant. Such an appeal may be taken only if the district attorney certifies to the Court of Criminal Appeals that the appeal is not brought for the purpose of delay and that the order, if not reversed on appeal, will be fatal to the prosecution of the charge.

(b) NOTICE OF APPEAL; TIME FOR TAKING PRE-TRIAL APPEAL. The notice of appeal shall be filed both with the clerk of the circuit court and with the clerk of the Court of Criminal Appeals within seven (7) days after the order has been entered, but in any case before the

defendant has been placed in jeopardy under established rules of law. The notice of appeal shall specify the charge or charges as to which, and the defendant or defendants as to whom, the appeal is taken. In a case in which multiple offenses or multiple defendants have been joined for trial, such specification on appeal shall be jurisdictional.

(c) PREFERENCE. All appeals and petitions for writs of certiorari pursuant to this rule shall have preference in the appropriate appellate court and shall be diligently prosecuted.

(d) EFFECT ON TRIAL COURT PROCEEDINGS. The filing of a notice of appeal in the circuit court pursuant to this rule shall stay the proceedings in the circuit court as to any charge with respect to which, and any defendant against whom, the appeal is taken.

(e) BRIEFS AND ARGUMENTS ON APPEAL. Briefs and arguments in the Court of Criminal Appeals shall be in accordance with the Alabama Rules of Appellate Procedure, except that, with regard to

briefs and arguments, that court may make such exceptions to those rules as it deems necessary or desirable in a particular case.

(f) RECORD ON APPEAL. The record on appeal shall be filed with the Court of Criminal Appeals in accordance with the Alabama Rules of Appellate Procedure, except that that court may require the filing of such a different record and may impose such a different schedule as that court may deem necessary or desirable in a particular case.

(g) REHEARINGS AND CERTIORARI. When the Court of Criminal Appeals has rendered a judgment in a pre-trial appeal taken pursuant to this rule, a party may, within seven (7) days, apply to that court for a rehearing. Applications for rehearing shall be subject to the provisions of Rule 40, A.R.App.P., as amended, to accommodate pre-trial appeals pursuant to this rule. Either party, whether or not that party has applied for a rehearing, may, within seven (7) days of the judgment of the Court of Criminal Appeals, or within seven (7) days of that court's order overruling an application for rehearing, file in

the Supreme Court a petition for writ of certiorari to review any decision of the Court of Criminal Appeals rendered in a pre-trial appeal pursuant to this rule. Petitions for writs of certiorari shall be subject to the provisions of Rule 39, A.R.App.P., as amended to accommodate pre-trial appeals pursuant to this rule.

(h) EFFECT OF RULING IN PRE-TRIAL APPEALS. If the trial court's ruling is upheld following a pre-trial appeal taken pursuant to this rule, then that affirmance shall operate as a bar to any further prosecution of the defendant or defendants as to whom the appeal was taken for any crime involved in the charge or charges as to which the appeal was taken, unless the trial court shall find that the subsequent prosecution is primarily based upon significant new evidence not reasonably available to the state when the pre-trial appeal was taken.

APPENDIX F

DETAILED STATEMENT OF THE FACTS

I.

THE UNDISPUTED FACTS

It is undisputed that on November 10, 1989, and again on November 15, 1989, Caldwell was arrested. No issue was raised in the Trial Court about legality of these arrests. Incident to each arrest, Caldwell was asked, first about the disappearance of a Ms. Harless and later about the murder of Ms. Harless. Prior to each interview, Caldwell was read a detailed Miranda warning, and a detailed waiver of rights. In each instance she acknowledged understanding her rights and the waiver and voluntarily waived her rights, once verbally and on other occasions by signing the waiver. In no instance was she

subjected to any force, threats, or promises or give any reward or hope of reward.[1]

There was no claim in the Courts below by Caldwell that any of her waivers or statements were coerced by the police. The sole claim in the Trial Court (C.R.pp.83-84) and the sole basis for the suppression of Caldwell's statements, was her alleged inability to understand a Miranda warning (C.R.p.132)

On the morning of Friday, November 10, 1989, the Tuscaloosa Homicide Metro unit, made up of investigators for the Tuscaloosa Sheriff's office and the Tuscaloosa and Northport City Police Departments, were processing the crime scene at the home of a Ms. Corinne Harless. (C.R.3 and

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[1]In the interest of brevity and clarity, these matters being undisputed, we will hereinafter simply say, to wit, "she was advised of her rights and voluntarily waived them." However, it should be understood that the record clearly shows that all of the incidents of a voluntary and intelligent waiver of rights were proven in detail as to each of Caldwell's statements.

Tr.24,34-35 and 84-85) Ms. Harless had disappeared from her home, leaving behind clear evidence of foul play. Also missing was Ms. Harless' automobile, a 1985 tan Mercury Cougar. (Tr.pp.8-10)

In the effort to find Ms. Harless, a BOLO ("Be On The Lookout") for her car had been issued. At 2:15 p.m, a call from an Investigator Patrick reported that Ms. Harless' vehicle had been located at the Jack's Restaurant at Thirty-second and Twenty-fifth Street in Tuscaloosa. A man and a woman were found occupying and operating the car. The woman was Caldwell. (Tr. pp. 8-11 and 22)

Corporal M. A. Flowers of the Tuscaloosa Police Department immediately proceeded to Jacks, where Caldwell had been arrested. Officer Latner, a female, patted Caldwell down for weapons. (Tr.pp.10-11)

Corporal Flowers advised Caldwell of her rights, and she voluntarily verbally waived them. Flowers did not notice any hearing defect on the part of Caldwell. (Tr.pp.11-14 and 31)

Flowers placed Caldwell in the front passenger seat of his vehicle; he did not recall her being handcuffed. (Tr.pp.12-13 and 32)

In route to the homicide division, Flowers asked Caldwell where she and her boyfriend, the other occupant of Ms. Harless' car, had obtained it. She replied that she and her boyfriend were staying at the Moon Winks motel[2] and that at 6:00 p.m. the previous evening, Donnie Gayle Holliday had come to the motel room driving Ms. Harless' car. According to Caldwell, Holliday's sweatpants were wet from the knees

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[2]Flowers knew that Ms. Harless' home, from which she had disappeared, was less than 100 yards from the Moon Winks Motel, across a ravine or through a few backyards. (Tr.p.16)

and down, and Holliday had been in possession of $160.00 he had not previously had. Caldwell related that at about 8:00 p.m, Holliday left the room and did not return until about an hour later. Caldwell said that she did not know where Ms. Harless was. (Tr.pp.14-16)

After receiving this information, Flowers advised his Captain about the motel. That call went out at 2:35 p.m. (Tr.17-18) Therefore, the entire incident which included Caldwell's first statement, from the time of her arrest until Flowers' call to his Captain, lasted 20 minutes. Flowers and Caldwell continued on to headquarters, a trip which took 5-7 minutes. (Tr.pp.19-20 and 29)

Flowers did not treat Caldwell differently from any other arrestee. (Tr.p.29)

When Investigator John Steele arrived at the homicide office in the early afternoon of November 10, I989, he found Caldwell waiting for him. He read her a standard Miranda warning and waiver. He asked her if she understood several uncommon words, such as "coerce" and, when she

indicated a lack of understanding, he explained them. Caldwell stated that she understood her rights and the waiver, indicated a desire to answer questions and signed the waiver. (Tr.pp.36-44 and 85-86)

At this point, the Investigators' primary interest was in finding Ms. Harless, who, as far as they knew, was still alive. (Tr.pp.47 and 53)

In her statement, Caldwell told the Investigators that she, her boyfriend, Zack Wedgeworth, and Donnie Holliday had driven to Ms. Harless' home, had put Ms. Harless' body in the trunk of her car, driven her to the river, and shoved her in. (Tr.pp.53-55)

Investigator Steel and Investigator Sergeant Alan Eugene Fondren, accompanied by Caldwell, went to the river in an effort to find Ms. Harless' body. However, they were unable to do so. While this search was in progress, some hunters found Ms. Harless' body. (Tr.pp.52-55 and 87-88 and 93)

It is significant that up to this point, Caldwell claimed that most of her information

came from having heard about events from Zack Wedgeworth and Donnie Holliday. (Tr.p.101)

After returning to headquarters, Investigator Fondren took a videotaped statement from Caldwell. Again, Caldwell was advised of her rights and voluntarily waived them. In his conversations with Caldwell, Fondren noticed no hearing or speech defects, although she was nervous. Fondren was experienced in working with retarded people. (Tr.pp.58-59,88-91,96-97, and 101-102)

The taped interview took a total of 30-40 minutes. At first, Caldwell answered the questions quickly. Later, when in Fondren's estimation she was telling the truth, her responses came more slowly. (Tr.pp.102-103)

Caldwell was treated no differently from any other arrestee. (Tr.p.102)

After the taped interview, Caldwell was allowed to talk to her boyfriend, and she was then released. Her release, however, was the result of a breakdown in communication among the investigators. (Tr.pp.59 and 103-106)

At 12:00 noon, November 15, 1989, Caldwell was arrested pursuant to a warrant. She was again advised of her rights and voluntarily waived them. She then gave the Investigators a second videotaped statement. (Tr.pp.61-65)

It was undisputed that Caldwell is an educable retarded person with an I.Q. of 71 and that she had completed the eleventh grade. (R.p.57 and Tr.pp.70,132, and 158-159)

However, it was also undisputed that, on June 7, 1990, six months after her statements to the police, the Department of Mental Health And Mental Retardation found that Caldwell was competent to consult with her attorney (R.pp.58-59 and 62) and to stand trial. (R.pp.55-62)

II.

THE CONFLICTING EVIDENCE

The conflicting evidence came from two experts, one presented on behalf of Caldwell and one on behalf of the State. They were both

highly qualified in different but related fields. They each examined some of the same evidence (e.g. Caldwell's school records) and some different evidence. For example, Caldwell's expert actually interviewed her but did not review the video tapes of Caldwell's November 10 and November 15, 1989, statements. While the State's expert did not actually interview Caldwell,[3] he did review the tapes and the records of the Defense expert's interview, and he did examine the video taped statements. There is, of course, no issue of the honesty of these experts. Yet, they reached opposite conclusions as to the Caldwell's ability to understand a Miranda warning.

Dr. Anne Williams Bishop is trained in special education for retarded people. She wrote

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[3]The State moved for an evaluation of the Appellee by its expert, Dr. Joe Wheeler Dixon. (R. P. 121) However, the Defense objected. (Tr. p. 346) The motion was withdrawn due to the ambiguity of the law. (R. p. 126)

her doctoral dissertation on the comprehension of Miranda rights by retarded people. (Tr.pp. 110-117)

On February 1, 1991, a year and two months after Caldwell's statements to the police, Dr. Bishop gave Caldwell a Grisso test, which is designed to determine a person's ability to understand a Miranda warning. It took this highly trained expert slightly over an hour to test Caldwell. Caldwell scored 15 out of 32 on the comprehension of Miranda test and 21 out of 30 on the Function Of Rights In Interrogation Test. As the result of this test, Dr. Bishop produced a eight page report (R.pp.86-93) and a fifteen page transcript, leading to the conclusion that Caldwell could not comprehend the concepts of Miranda. (R.pp.86-109 and Tr.pp.117-134)

Dr. Bishop testified that it was possible for a person to malinger or fake on the Grisso Test. (Tr.pp.30 and 31) Although she did not think that Caldwell was malingering. Dr. Bishop

had never observed a test subject that she thought was malingering. (Tr.p.152)

Dr. Joe Wheeler Dixon is a clinical psychologist. Like Dr. Bishop, Dr. Dixon is trained to test people for their ability to comprehend Miranda (Tr.pp.268-70)

Dr. Dixon is personally acquainted with Dr. Thomas Grisso, who developed the Grisso Test, and is familiar with Dr. Grisso's work. (Tr.pp.273-274)

One of the weaknesses of the Grisso Test is that there is no way to rule out malingering. Another problem with the test is that it is academic, i.e. it tests the subject's abstract knowledge of the constitutional principles, rather than their practical understanding of how these principles affect them. In addition, the Grisso Test makes the simple Miranda warning appear to be very complex. (Tr.pp.277 and 285-288)

Dr. Dixon criticized Dr. Bishop's methodology. In addition, he pointed out that when the test Dr. Bishop administered moved away

from academics, Caldwell's understanding was correct. (Tr.pp.288-292)

Dr. Dixon reviewed the video tapes of Caldwell's November 10 and November 15, 1989, statements. He considered these to be important evidence on the issue of Caldwell's comprehension of Miranda, since the longer a person is "in the system", the "wiser" they become. Dr. Dixon judged from these that Caldwell's understood her rights. (R.pp.279-285)

Dr. Dixon concluded that Caldwell was competent to understand a Miranda warning and to waive her rights. He testified that Caldwell was as competent as the average person with respect to the practical application of Miranda. (Tr.pp.295-296 and 316)

III

SUMMARY STATEMENT OF THE CONFLICTING EVIDENCE

The following statement from Caldwell's Statement of the Facts in her brief in the Court of Criminal Appeals of Alabama, provides an

excellent summary of the conflicting evidence, and in its Reply Brief the State adopted it:

> "...Dr. Bishop testified that the Defendant, Tracy Caldwell was unable to adequately comprehend the concepts contained in the "Miranda Warnings". (TR. 143--150). Dr. Dixon, who testified by way of Deposition and who had never interviewed the Defendant, (TR. 279), testified that Tracy Caldwell was competent to knowingly and intelligently waive her rights. (TR. 295). It is this dispute between the experts upon which the trial court issued its ruling and made a finding that 'the defendant could not understand her Miranda Rights and did not freely and voluntarily waive said rights'. (R.132)...." (Appellee's Brief, pages 1-2)